

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 212 of 2014**

BETWEEN

**BHANABHAI PROPERTY HOLDINGS LIMITED** a limited liability company  
having its registered office at 33 Raojibhai Patel Street, Sva.

**PLAINTIFF**

AND

**SHIV RAM** trading as **SHIV RAM MAINTANANCE WORK** and having its  
registered office at 298 Ratu Mara Road, Samabula, Suva.

**DEFENDANT**

**Counsel** : Ms. N. Choo for the Plaintiff.  
Mr. D. Prasad for the Defendant.

**Dates of hearing** : 01<sup>st</sup> & 02<sup>nd</sup> May, 2017

**Date of Judgment** : 26<sup>th</sup> June 2017

# JUDGMENT

- [1] The plaintiff obtained the services of the defendant to carry out certain repair works to the plaintiff's building at 53 Suva Street, Toorak, Suva and these proceedings were instituted by the plaintiff alleging that the defendant failed to carry out the repair work to its satisfaction and therefore it had to obtain services of another contractor to complete the repair work by paying an additional amount of money.
- [2] The plaintiff in these proceedings is seeking to recover the following amounts of money paid to the defendant as labour charges and costs of the material purchased for the repair work.
- [3] The details of the amount claimed by the plaintiff from the defendant are as follows;
1. \$5,465.29 for the work done on the property.
  2. \$1,560.00 for scaffolding which was not used by the defendant.
  3. \$4,691.04 for the material ordered by the defendant.
  4. \$49,099.80 for the remedial work quoted by another contractor.
- [4] The defendant on the issue of the leakage in the roof states in his statement of defence that the leakage he repaired for \$217.35 was different to that of the leakage referred to in the paragraph 4 of the statement of claim of the plaintiff where it is stated that the defendant was paid \$1,689.35 for the repair of the leakage in the roof. It is the position of the defendant that while the work was in progress the defendant's director Mahesh Kumar's son Viney Kumar instructed the defendant to stop the work. In answer to the allegation that the defendant did not use the scaffolding the defendant replied that due to bad weather conditions he was not able to use the scaffolding and when he was ready to use them the Suva Property Maintenance Limited refused to provide the scaffolding because a period of six months had lapsed.
- [5] To the allegation that the defendant fixed the downpipes inside the building he replied that the Director Mr. Mahesh Kumar instructed him to fix the downpipes from inside the building. While admitting that he made holes on the walls the defendant averred that the holes were made to take the down pipes out since the Director Mahesh Kumar instructed him to fix the downpipes from inside the building. The defendant also averred that he was unable to cover the holes because he was asked to stop work.



[6] As per the minutes of the pre-trial conference the parties have admitted the following facts;

1. The plaintiff is a limited liability company having its registered office at 31 Raojibhai Patel Street, Suva. (According to the statement of claim the number of the premises is 33).
2. The defendant is trading as Shiv Ram Maintenance Work having its registered office at 298 Ratu Mara Road, Samabula, Suva.
3. The plaintiff is the registered proprietor of the property located at 53 Suva Street, Toorak.
4. The defendant in December contracted to carry out general carpentry work and repairs to the plaintiff's premises at 53 Suva Street, Toorak, Suva.
5. The defendant inspected the roof and found the leakage caused due to heavy rainfall and proceeded to fix the leakage and charged the plaintiff \$217.35.
6. The defendant did other work apart from attempting to change the leaking roof.
7. The defendant installed guttering pipes inside the plaintiff's building.
8. The defendant charged the plaintiff \$1050.40 in March, 2012 and \$287.04 in April, 2012 for making the water proofing boxes for the gutter outlets and ceiling panels.
9. The defendant obtained a cheque for \$1560.00 for scaffolding under the name of Suva Property Maintenance Limited.
10. No scaffolding was used on the Plaintiff's property.

[7] The first witness for the plaintiff Mr. Krishnil Pratap is the Manager and also a director of the Safeway Plumbing and Sheet Metal Works Limited who was retained by the plaintiff to complete the repair work after the contract it had with the defendant was terminated. The witness testified that the work of the defendant was not good. The witness referred to a plan (P2) and explained to the court where the leakage was and how it should be repaired. The witness also tendered photographs (P7 - P11) to show the damages caused to the building and the manner in which the downpipes have been fixed by the defendant. However, the witness admitted that he is not an expert on the subject of building construction but said that he has eight years' experience in the area of building construction. The witness tendered in evidence marked as "P12" to "P27" the invoices issued "Kasabias" for the purchase of the materials for the repair work



done by the defendant and said that if the defendant did his work properly it would not have been necessary for his company get involved in the repair work. When document "P3" was shown the witness he said that it was not for the entire building but only for two or three rooms but he could not exactly say which part of the building. The quotation "P4" was only to repair the gutter and the quotation "P1" is for the replacement of the entire gutter. The witness said that the damages to the tiles as shown in "P9" could have been caused by chairs.

- [8] Pranish Vijendra Singh is the draftsman who drew the plan "P2". It is his evidence that the work done by the defendant was not in conformity with the drawings and the work had been done haphazardly and if the gutter was fixed properly the damages would not have happened. When the pictures (P7 to P11) were shown to the witness he stated that he cannot say the extent of the damage caused to the wall and the floor. He also said that tiles can pop up due to vibration or even by chairs.
- [9] Witness Vinay Kumar testified that the defendant was employed to repair the gutter. He fixed the gutters inside the building and there was a delay in the work of about 1 ½ years and he asked the defendant to stop the work. He testified further that the defendant cause extensive damage to the floor by using the jackhammer to make holes on the ground.
- [10] Witness Mahesh Kumar who is the father of the previous witness Vinay Kumar has engaged the defendant to do the repair work in the building. It is his evidence that the downpipes were to be fixed outside the building and he did not instruct the defendant to fix them from inside the building. He also said that he did not instruct the defendant to dig the floor of the building. When the invoices marked and tendered in evidence as "P12" to "P27" were shown to the witness he said that the items appear in the invoices were ordered by the defendant and the witness paid for the materials purchased. The witness also testified that the scaffoldings were requested by the defendant but he did not pick them up and kept delaying it. In cross examination the witness admitted that the roof was leaking in late 2010 and 2011 and the tenant the C.I.D. complained about it. He also admitted that there were water marks on the walls and also on the floor before the defendant commenced work.
- [11] The defendant testified on his behalf and admitted that he was engaged by the plaintiff to repair the leakage and he was paid for the work done. It is his evidence that the downpipes were fixed inside the building because there was a delay in getting scaffolding. In cross-examination he said that he had authority



from the plaintiff to fix the downpipes from inside the building. The witness testified further that the delay was due to the scaffoldings were being used by another person and stated further that it was the duty of the plaintiff to bring scaffolding and fix it at the site. When exhibit 24(b) [P7] was shown to the witness he said that it was how the building looked when he left the site. With regard to the materials provided for the work the witness said some of it was used for the partition of the building and the rest was used to repair the gutter. He said that he did not use a Jackhammer to dig holes but used a drill. It is his evidence that the delay in completing the work was due to rain and also due to the other work he was doing for plaintiff.

[12] From the photographs (P7 - P11), the correctness of which has not been challenged by the defendant, it appears that the defendant has not done the work to according to the drawings. The defendant's position is that witness Mahesh Kumar authorised him to fix the downpipes from inside the building which was denied by Mahesh Kumar. Whether the approval to fix the downpipes from inside the building was given by Mahesh Kumar is one of the important issues for determination. The evidence before the court in this regard is the two contradictory oral testimonies of Mahesh Kumar and the defendant. If the court finds that the defendant fixed the downpipes from inside the building with the consent of Mahesh Kumar, the director of the plaintiff company, the plaintiff is not entitled to claim damages caused in the process of fixing the down pipes.

[13] The only evidence on the question whether the defendant fixed the downpipes from inside the building with the approval of Mahesh Kumar is the Shiv Ram's statement and Mahesh Kumar's denial. There is no other evidence to support the contradictory contentions of these two witnesses. In my view no reasonable person would keep on paying a contractor without inspecting and assessing the work. The photographs show the manner in which the downpipes have been fixed. If it had not been done according to the plan the plaintiff should have raised it with the defendant immediately. It is the evidence of Mahesh Kumar that he could not inspect the work as he was not well. This in my view is not a plausible excuse because there is no evidence that the functions of the plaintiff company came to a standstill because of his illness. The company could have deployed an officer to inspect the work. By looking at the photographs it cannot be said that the fixing of the downpipes was done in a day or two. Witness Mahesh Kumar's evidence in cross-examination is that half of the time he was not happy with the work of the defendant. However, he had continuously paid the defendant for the work done and for the materials. In my view evidence of this



witness who engaged the defendant to do the work and who was responsible in supervising the work, is not reliable. The evidence of Shiv Ram is that since there was a delay in supplying the scaffoldings he fixed the down pipes from inside the building with the approval of the Mahesh Kumar and the reason for the delay in supplying scaffolding was that the scaffoldings were being used by another person. In the circumstances the only reasonable conclusion the court could arrive at is that the defendant has fixed the downpipes from inside the building with the approval of Mahesh Kumar.

- [14] The evidence of the witnesses for the plaintiff is that the damage to the walls and the floor was caused by the defendant by trying to fix the downpipes from inside the building by using a jackhammer. From the documents tendered in evidence it appears that the defendant company had been working for the plaintiff company since December, 2011. It is the evidence of Mahesh Kumar that he was immobilized and could not check the work and in March, 2012 he was away for medical treatment and therefore was not aware of what happened. He also said that in October, 2013 he had no issues with the work and he paid him. That means the work done by the defendant till October, 2013 has been to the satisfaction of the plaintiff. Therefore, the plaintiff is not entitled to claim the monies paid to the defendant and also the expenses incurred by the plaintiff to purchase the material till October, 2013.
- [15] The plaintiff claims \$5465.29 as the amount paid to the defendant for the work done. It is not clear the basis on which the plaintiff is claiming this amount. If the defendant has done the work for the amount paid to him the plaintiff has no basis to recover that amount from the defendant. If the work was not satisfactorily done the plaintiff could have refused to pay the money. There is no evidence as to the nature of the work the defendant was entrusted to do. As submitted by the learned counsel the defendant had been entrusted to do various other works apart from repairing the leaking gutter but there is no evidence for which work this amount of money was paid. Assuming that the plaintiff is entitled to recover the amount paid to the defendant as labour charges for the work done on the gutter, the plaintiff must tell court exactly the amount paid for that work. The plaintiff has failed to adduce evidence in that regard.
- [16] The plaintiff also claims \$1560.00 from the defendant as the amount paid for scaffoldings which were not used by the defendant. Although the plaintiff paid for the scaffoldings it never reached the work site. The plaintiff's evidence is that it was the responsibility of the plaintiff to provide the scaffoldings and since they

were being used by another person there was a delay in delivering the scaffoldings at the site. The learned counsel for the plaintiff submitted that the defendant has taken up a different position in the statement of defence that the scaffoldings could not be collected due to bad weather and after lapse of six months the Suva Property Maintenance Limited refused supply the scaffoldings. It is correct to say that the position taken up by the defendant in the statement of defence is different for the evidence of Shiv Ram. However, the pleadings are not evidence before courts of law. In cross-examination the counsel for the plaintiff should have confronted Shiv Ram with the averments in the statement of defence which the learned counsel failed to do. If the scaffoldings were not supplied by Suva Property Maintenance Limited the plaintiff must claim the amount paid for the scaffoldings from them. The plaintiff's witnesses did not say that the scaffoldings were brought to the site but the defendant did not use it.

- [17] The plaintiff claims \$4691.04 from the defendant as the amount paid for the materials. The plaintiff tendered in evidence invoices on the payments made for the materials as "P13" to "P27", "P37" to "P41" and "P45". There is no evidence that all these materials were used to fix the leaking gutter. The plaintiff has not identified which of the materials were purchased for the repair work of the gutter. There is also no evidence that the defendant did not use these materials for the work done.
- [18] On the other hand if the plaintiff is successful in recovering the sum claimed as the amount required for the remedial work it will be sufficiently compensated for the alleged damages caused to the building by the defendant. If the plaintiff is awarded all the monies claimed in the statement of claim it will be unjustly enriched.
- [19] It is common ground that the leakage in the gutter had been there since late 2010, before the defendant commenced work in the building and water marks were found on the walls. Therefore, the defendant cannot be held liable for the entire damage caused to the building due to the leakage in the roof.
- [20] The witness Krishneel Pratap testified that the cost of work done by them for the plaintiff was \$45,000.00 but they gave a discount of \$2000.00. In cross-examination the witness admitted that for the above price they also did some other work. The burden was on the plaintiff to satisfy court that the amount claimed is the exact amount incurred for the remedial work.



- [21] It is alleged that the floor tiles were damaged and some were loosened due the use of a jackhammer which Shiv Ram denied. None of the witnesses who testified for the plaintiff has seen the defendant's workers using a jackhammer to create holes on the wall or on the floor.
- [22] For the reasons set out above court is of the view that the plaintiff has failed to establish that the amounts claimed in the statement of claim are in fact due and owing from the defendant.
- [23] Accordingly, the court makes the following orders.

**Orders**

1. The statement of claim of the plaintiff is struck out and the action is dismissed.
2. The plaintiff is ordered to pay the defendant \$2000.00 as costs of this action.



  
Lyone Seneviratne

**JUDGE**

26<sup>th</sup> June, 2017